IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 431 of 2006
With
FIRST APPEAL No. 580 of 2006
With
CIVIL APPLICATION No. 2410 of 2006
With
CIVIL APPLICATION No. 3287 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

FIRST APPEAL No. 431 of 2006 / C.A. No.2410 of 2006

VISHNUBHAI BABABHAI THAKORE
Versus
THE CHARITY COMMISSIONER AND OTHERS

==========

Appearance :
MR PS CHAMPANERI for the Appellant.
Mr. N.D. Gohil, Asst. Government Pleader for Respondent No.1
MR DILIP B RANA for Respondent No. 2 - 3.
MR DJ BHATT for Respondent No. 4

==========

FIRST APPEAL No. 580 of 2006 / C.A. No.3287 of 2006

GOVINDBHAI GOPALBHAI PATEL
Versus
PRAVINCHANDRA HARGOVINDDAS PATEL AND OTHERS

==========

MR VIKRAM J THAKOR for the Appellant.
MR DILIP B. RANA for Respondent No.1-2
Mr. N.D. Gohil, Asst. Government Pleader for Respondent No.3
MR DJ BHATT for Respondent No. 4
MR SN THAKKAR for Respondent No.5

==========

CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 24/08/2006

COMMON ORAL JUDGMENT

Since common point is involved in both these appeals, both these appeals are disposed of by this common judgment with the consent of the parties.

Both these appeals are filed under section 47.B of the Bombay Public Trusts Act, 1950 [for brevity, hereinafter referred to as the Act]. It is pointed out by the advocates that though it is stated in the memo of appeal that the appeals are filed under section 72 (4) of the Act, the same are as such filed under section 47.B of the Act.

These appeals are directed against the judgment and order passed by the learned 2nd Additional District Judge, Ahmedabad Rural on 31st January 2006 in Civil Misc. Application No. 53 of 2001 filed by

Pravinchandra Hargovinddas Patel and Ambalal Labshankar Pandya against the Charity Commissioner under section 47 of the Act. The said Pravinchandra Hargovinddas Patel and Ambalal Labshankar Pandya are respondents No. 2 and 3 in First Appeal No. 431/06 and No.1 and 2 in First Appeal No. 580/06. By the aforesaid order dated 31st January 2006, learned 2nd Additional District Judge, Ahmedabad Rural, allowed application Exh.14 whereby Manilal Ambalal Patel was appointed as Committee Member in the vacancy created by the death of Bhailalbhai Dahyabhai Patel, and rejected application Exh. 30 filed by Vishnubhai Babubhai Thakore [respondent No.5 in FA No. 580/06] for being appointed so.

Short facts of the case are as under:

Athia Samast Panch is a Trust which is registered under the provisions of the Act and its registration Number is E.754 [hereinafter referred to as the Trust]. The Trust in question is situated at Pirana and has properties at Pirana as well as at Ahmedabad.

A Civil Suit was filed in the year 1905, being Trust Suit No. 7 of 1905 in which a scheme of administration [hereinafter referred to as the Scheme] was framed by the District Judge, Ahmedabad on 23.12.1908. The management of the Trust has been carried out as per the provisions of the said Scheme. Clauses 2 to 4 of the Scheme provide as under:

> "2. (a). The Athia Samast Panch Committee shall consist (in addition to the Saiyad representative) of five members when there are two Kakas and of three members when there is only one Kaka.
>
> (b). The term of membership of each (except in the case of the

Saiyad representative) shall be for life.

(c). The first Saiyad Representative shall be the senior member of the eldest branch of the sons of Hassanalli. His Membership shall continue for a period of three years and he shall be succeeded by the elder member of the next senior branch for the next period of three years and he shall be succeeded by the eldest member of the junior branch of the next period of three years; and the branches shall continue to represent the Saiyad on the committee in the same order and rotation. In the event of the elder member of the branch for the time being entitled to representation being in the opinion of the District Judge inefficient to properly perform the duties of his office as a member of the committee, the next senior member of the branch who is in the opinion of the Distrait Judge efficient member of the branch at the time when a vacancy has to be filled, the District Judge shall select a member from the next senior branch in the same manner to fill the vacancy. But no branch shall be represented on the committee for more than three years in succession;

(d). The Kaka or Kakas shall be ex-officio members of the committee. The other members shall be selected by the District Court.

3. (a). If any of the Kakas dies the Athia Samast Panch, meeting at Pirana on the occasion of his obsequies shall (unless they wish the surviving Kaka to be sole Kaka) proceed to elect another in his stead provided that the District Court on an application being made to it and in good cause being shown may direct that only those who belonged to the deceased Kaka's party should elect his

successor.

(b). If any of the members selected by the District Court dies that Court shall select another in his stead.

(c). The procedure herein described shall be followed not only when a vacancy is caused by death but when it is due to any other cause.

4. The District Court in order to make its selection may call upon the Pleaders of the parties to suggest the names of persons fit and willing to be appointed members of the Committee or convene a meeting of the Athia Samast Panch or appoint a Commissioner for ascertaining their opinion or direct an election by them or by representative Athia headmen, and it may make such inquiry as it things fit. All the costs of every such proceedings shall be paid and (if the Court so requires) deposited by each of the Kakas half and half or when there is one Kaka by him alone.

When the Athias are not divided into factions, the District Court shall instead of selecting any members, direct the Athias assembled at Pirana to choose them.

As per the scheme, Kaka or Kakas shall the ex-officio members of the Committee. For the purpose of appointing a member of the Committee, a procedure is prescribed under clause 4 of the Scheme.

On behalf of the Managing Committee of the said Trust, Pravinchandra Hargovinddas Patel and Ambalal Labshankar Pandya filed an application under section 47 of the Act for appointing a new trustee in place of deceased Bhailalbhai Dahyabhai Patel who died on 03.11.91. [The said Pravinchandra Hargovinddas Patel and Ambalal Labshankar Pandya are respondents No. 2 and 3 in First Appeal No. 431/06 and

No.1 and 2 in First Appeal No. 580/06]. The learned Judge decided to select a member by inviting applications and for that purpose, a public advertisement was issued inviting applications for appointment to the post of Committee Member of the said trust. The advertisement was published in daily newspapers on 06.02.02 asking persons interested to apply on or before 28.02.02. The last date for submission of application was 28.02.02. In response to the public notice, six persons applied for being appointed as a member of the Committee. They are:

(1). Dalsukhbhai J Panchal
(2). Khushalbhai Natvarbhai Patel
(3). Anilbhai Ramanbhai Patel
(4). Manilal Ambalal Patel
(5). Rameshbhai Fulabhai Patel
(6). Vishnubhai Bababhai Thakor

Out of the aforesaid, Vishnubhai Bababhai Thakor applied on 12.10.04 whereas the last date prescribed in the advertisement for receipt of application was 28.02.06. Other four applicants, viz. Dalsukhbhai J Panchal, Khushalbhai Natvarbhai Patel, Anilbhai Ramanbhai Patel and Rameshbhai Fulabhai Patel withdrew their applications with the result that only two persons remained in the fray, Manilal Ambalal Patel and Vishnubhai Bababhai Thakor. Learned District Judge found that Vishnubhai Bababhai Thakor has submitted his application after a considerable period and after the last date prescribed in the advertisement, and hence his application was not considered on the ground of delay. In the result, Manilal Ambalal Patel remained in the fray as the sole applicant.

However, it is required to be noted that before moving the application under section 47 of the Act, the Managing Committee of the

Trust had already passed a resolution earlier appointing Manilal Ambalal Patel as a Committee Member in place of deceased Bhailalbhai Dahyabhai Patel, and it is also submitted before this Court that on 26.07.2000, the said appointment was also approved by the general body and it is further submitted a copy of the said decision was also produced before the learned District Judge.

Learned District Judge allowed the application Exh.14 submitted by Pravinchandra Hargovinddas Patel and Ambalal Labshankar Pandya on behalf of the Managing Committee of the said Trust, and appointed Manilal Ambalal Patel as a Committee Member in place of deceased Bhailalbhai Dahyabhai Patel. By the same order, the learned District Judge rejected application Exh.33 given by Vishnubhai Bababhai Thakor for being appointed as a Committee member of the Trust. In the said proceedings, an objection was also raised by one Govindbhai B Patel at Exh. 61, who is a sitting member of the committee. His objections were also disallowed by the learned District Judge.

Being aggrieved by the aforesaid order passed by the learned Judge Vishnubhai Bababhai Thakore and Govindbhai Gopalbhai Patel have field First Appeals No. 431/06 and 580/06 respectively. Vishnubhai Bababhai Thakore [F.A. No.431/06] has contended that his application was wrongly rejected by the learned District Judge on the ground of delay as well as on the ground that the appointment of Manilal Ambalal Patel [F.A. No. 580/06] is not in consonance with the Scheme. Govindbhai Gopalbhai Patel has contended that his objections, Exh.61 was wrongly dismissed by the learned Judge.

Before dealing with the contentions raised by the learned advocates in this matter, it would be necessary to refer to section 47 of

the Act, which reads as under:

"47. ***Power of Court to appoint new trustee or trustees, as the case may be.***-

(1). Any person interested in a public trust or the Charity Commissioner may apply to the Court for the appointment of a new trustee, when a trustee of such trust -

(a). disclaims or dies;

(b). is for a continuous period of six months absent from India without the leave of the Charity Commissioner or Deputy or Assistant Charity Commissioner or the officer authorized by the State Government in this behalf;

(c). leaves India for the purpose of residing abroad;

(d). is declared an insolvent;

(e). desires to be discharged from the trust.

(f). refuses to act as a trustee.

(g). becomes in the opinion of the Court unfit or physically incapable to act in the trust or accepts a position which is inconsistent with the tryst; or,

(h). if any of the cases mentioned in Chapter III is not available to administer the trust.

(2). No such application shall be entertained.-

(a). unless the trustee who on account of any of the reasons mentioned in clauses (a) to (h) of sub-section (1) is not fit or available to administer the trust is the sole trustee or unless by the vacation of office by one or more trustee on account of any of the said reasons the minimum number of trustees required by the instrument, scheme, order or decree of the Court or

usage or custom of the trust for the administration of the trust is reduced;

(b). (i) until the expiration of a period of three months from the date on which the trustee is not so fit or available to administer the trust; and

(ii).if a new trustee has been appointed in the said office during the said period in accordance with the instrument, scheme, order or decree of the court, or custom or usage of the trust.

(3). The Court after making an inquiry (may by order appoint) the Charity Commissioner or any other person as the trustee to fill up the vacancy.

(4). In appointing the trustee under sub-section (3) the Court shall have regard -

(a) to the wishes of the author of the trust;

(b) to the wishes of the person, if any, empowered to appoint a new trustee;

(c) to the question whether the appointment will promote or impede the execution of the trust;

(d) to the interest of the public or the section of the public who have interest in the trust; and

(e). to the custom and usage of the trust.

(5). Where the Charity Commissioner is appointed as a Trustee, he shall be the sole trustee.

(6). The (order) of the Court under sub-section (3) shall be deemed to the the decree of the Court and an appeal shall lie therefrom to the High Court. “

On behalf of the appellants, learned advocates Mr. Champaneri and Mr. Vikram Thakore have submitted that the order passed by the

learned District Judge is contrary to law and contrary to Scheme as also contrary to the provisions of section 47 of the Act. It is submitted that there is no procedure prescribed anywhere for inviting applications by public advertisement for selecting a Committee Member and the Court is not required to take interviews and that selection is required to be made as provided under section 47 of the Act read with the Scheme. They submitted that ultimately the learned Judge is required to appoint a person as a member of the Committee, who, according to the learned Judge is such a person who can be helpful in the management of the Trust, and therefore, the best available person is required to be selected as a member. They have further submitted that even if the application is submitted at a later point of time, the Court can consider the application of such candidate if it is found that the applicant is otherwise eligible, without throwing it away on the ground of delay. They have further submitted that period of limitation is not prescribed either in the Scheme or in the Act. It is further submitted that even though the post was vacant since 1991 as Bhailalbhai Dahyabhai Patel died on 03.11.91 no attempt was made by the Trust by moving the Court, and instead of moving the Court immediately for appointment under section 47 of the Act, the Managing Committee has passed a resolution appointing Manilal Ambalal Patel as a member of the Committee and the said resolution was placed on record before the trial Court.

Learned advocate Mr. Rana who is appearing for the Managing Committee on the other hand submitted that since there was only one candidate in the fray as others had withdrawn their candidature and one candidate has given application after the time limit, the learned Judge had no option but to appoint the said Manilal Ambalal Patel as member of the Committee of the Trust. He submitted that in that view of the matter, the appointment of Manilal Ambalal Patel is just and proper as

the Court had the right to select a person as member of the Committee and that only one person was available and eligible for such selection.

Learned advocate Mr. D.J. Bhatt who is appearing for Shri Manilal Ambalal Patel, who is selected by the District Judge as a member, has supported the argument of Mr. Rana. Mr. Bhatt also further submitted that there is no objectionable material available on record against his client, and, therefore, the learned Judge has rightly selected him as a member of the Committee of the Trust. Mr. Bhatt further submitted that the appellant of F.A. No. 431/06, Vishnubhai Babubhai Thakore, having participated in the selection now cannot say that the procedure adopted by the Court is not correct. He submitted that he is now estopped from taking this point.

I have heard the learned advocates at length. I have also gone through the record and proceedings which were called from the trial Court.

The Scheme, as pointed out earlier, provides for selection of a member for the purpose of filling up vacant post. As per clause 4, the Court has options: viz. (i). Call upon the Pleaders to suggest the names of persons fit and willing to be appointed members of the Committee; (ii). Convene a meeting of the Athia Samast Panch, (iii). Appoint a Commissioner for ascertaining their opinion; (iv). Direct an election by them or by representative Athia headmen. These options are available to the Court when the Athias are divided into factions. However, when the Athias are not divided into factions, instead of the Court selecting any member, direct the Athias assembled at Pirana to choose them. Considering the aforesaid scheme, it is clear that firstly the Court is required to find out whether the Athias are divided into factions or not,

and if it is found that there is no division, the Court should not select a member but the Court is required to direct the Athias to assemble at Pirana and select a member. There is nothing on the record, nor the advocates appearing in the matter is in a position to point out whether the Athias are divided into factions. Since this aspect is not clear from the order, the order in question is required to be set aside and the matter is required to be sent back to the District Court for considering the said aspect. However, even if the Court ultimately comes to the conclusion that there is a division amongst the Athias, then also, as per the scheme, the Court is required to ascertain from the concerned advocates appearing for the parties to suggest the names, or, in the alternative, the Court can convey a meeting of the Athias at Pirana, or even appoint a commissioner for ascertaining the opinion of the members or may direct that an elections should be held by them. Even if the Court is of the opinion that the Athias are divided into factions, the Court can avail the procedure prescribed under the Scheme even by asking the Athia Samast Panch to convey a meeting for selecting the member or may even appoint a Commissioner for ascertaining the wishes or opinion or may direct an election as provided under the Scheme. I, therefore, find substance in the argument of the appellants that there was no question of inviting application by public advertisement as the learned Judge was required to follow the aforesaid procedure by availing the options as provided under clause 4 and as indicated hereinabove.

Further, even assuming that as per clause 4 of the scheme, the Court can select a person by inviting applications, then also, at the time of making selection, the Court can certainly consider the name of any eligible person as ultimately it is the duty of the Court to select the right person. Even if somebody might have applied late, that is not a ground for not considering the name of that person in case when the application

was made, the Court has not yet made selection of any member. However, if the application is received after the entire process of selection by the Court is over, the matter stands on an altogether different footing. The ultimate object behind the scheme is to appoint a right person and that is why powers are given to the Court to select the right candidate who is to be appointed as member of the Committee. In the instant case, there is no period of limitation or statutory bar which prohibits the learned Judge from considering the name of any candidate even if such candidate has applied after the prescribed time and it is open to the learned Judge to consider such name because a fit person is required to be appointed as member of the Committee. It is also required to be noted here that neither the scheme nor the provisions of the Act provide for any period of limitation.

Considering the aforesaid aspect of the matter, both the appeals are allowed. The impugned order dated 31.0106 passed by 2nd Additional District Judge, Ahmedabad Rural in Civil Misc. Application No. 53 of 2001 is quashed and set aside and the matter is remanded to the learned District Judge for taking fresh decision in connection with the appointment of member of the Committee in accordance with clause (4) of the Scheme and section 47 of the Act. The learned Judge shall take a fresh decision in accordance with law as well as keeping in mind the various provisions of the Scheme, provisions of section 47 of the Act and the observations made in the order. It will be open to the parties to raise all available points/grounds before the learned District Judge in support of their respective claims/contention. Before passing final orders, the Court shall also hear the Charity Commissioner and ascertain his views as the Trust is registered with the Charity Commissioner under the Act and it is ultimately for the Charity Commissioner to ensure that the Trust functions as per provisions of the Act. It is clarified that this

Court has not expressed any opinion about the merits of any candidate including Manilal Ambalal Patel, whose appointment has been accepted by the learned Judge. After following the proper procedure, the Court may take appropriate decision in connection with the selection of the member of the aforesaid Trust. Accordingly, both these appeals are allowed. The impugned order is set aside. The learned Judge may decide the proceedings as expeditiously as possible, preferably within a period of three months.

Registry is directed to immediately send the Record and Proceedings to the District Court.

In view of the aforesaid orders passed in the First Appeals, no further orders are required to be passed in the Civil Application. Interim Relief stands vacated. Notice is discharged.

No order as to costs in all these matters.

[P. B. MAJMUDAR, J.]

mathew